



INTERIOR BOARD OF INDIAN APPEALS

Rebecca Torres v. Acting Muskogee Area Director, Bureau of Indian Affairs

34 IBIA 173 (11/22/1999)

Related Board case:
35 IBIA 138



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
4015 WILSON BOULEVARD
ARLINGTON, VA 22203

REBECCA TORRES

v.

ACTING MUSKOGEE AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS

IBIA 99-26-A

Decided November 22, 1999

Appeal from a decision concerning a tribal government dispute within the Alabama-Quassarte Tribal Town.

Vacated and remanded.

1. Indians: Civil Rights: Indian Civil Rights Act of 1968--Indians: Tribal Government: Generally

In discharging its duties under its government-to-government relationship with an Indian tribe, the Bureau of Indian Affairs has the authority and the responsibility to decline to recognize a tribal action when it finds that the action was tainted by a violation of the Indian Civil Rights Act, 25 U.S.C. § 1302.

APPEARANCES: Geoffrey M. Standing Bear, Esq., Pawhuska, Oklahoma, for Appellant; Gary S. Pitchlynn, Esq., Norman, Oklahoma, for Alison Alexander.

OPINION BY ADMINISTRATIVE JUDGE VOGT

Appellant Rebecca Torres seeks review of an October 26, 1998, decision of the Acting Muskogee Area Director, Bureau of Indian Affairs, concerning a tribal government dispute within the Alabama-Quassarte Tribal Town (Town). ^{1/} For the reasons discussed below, the Board vacates the Area Director's decision and remands this matter to him for further action.

^{1/} Appellant's notice of appeal also named the Governing Committee of the Town as an appellant. However, the composition of the Governing Committee is in dispute in this appeal. Therefore, the Board does not consider the Governing Committee, as an entity, to be a proper appellant in this case.

Background

The Town is organized under the Oklahoma Indian Welfare Act, 25 U.S.C. § 503. Its governing document is a Constitution ratified on January 10, 1939. Article V of the Constitution establishes the Town's government. It provides:

The officers of this town shall be the Chief, the Second Chief, the Secretary, the Floor Speaker, the Solicitor, the Chairman of the Governing Committee, and twelve members of the Governing Committee. The powers of the town shall be exercised by the Chief with the consent of the Governing Committee. In case of a dispute between the Governing Committee and the Chief, the matter shall be settled by the Solicitor.

Other provisions of the Constitution relevant to this dispute include Article III, Membership; Article IV, Adoption and Withdrawal of Members; Article VI, Eligibility for Office; and Article VII, Removal From Office and Filling Vacancies.

Article III provides:

All persons who were on either the 1890 authenticated census roll or the 1895 pay roll of the towns of Alabama and Quassarte No. 1 were and shall be members. All persons born of parents both of whom were members when the person was born were and shall be members. All persons born of women who were members when the person was born were and shall be members. All persons born of non-Indian women whose fathers were members when the person was born were and shall be members. All members shall have equal rights except as set forth below in connection with eligibility for office.

Article IV provides: "Any Indian may be adopted as a member by the Chief with the consent of the Governing Committee through its chairman, and with the consent of the Secretary of the Interior."

Article VI provides:

No person shall be eligible to take office after the adoption of this Constitution and By-laws unless he is a member of the town. No mixed blood member may hold office unless it shall be decided by a majority vote of the members that he is dependable and has special qualifications. Adopted members may take office only with the consent of the members by a majority vote.

Article VII provides: "Officers may be removed by a majority vote of the members of the town. Vacancies in office shall be filled for the unexpired term by a majority vote of the Governing Committee."

The Town has an enrollment ordinance. Enacted by the Governing Committee on June 15, 1985, the ordinance created an Enrollment Committee and established procedures for enrollment in the Town. It did not, however, address the subject of disenrollment.

Apparently the Town has had membership problems since at least the mid-1980's. At that time, there were allegations that some tribal government officials were not members of the Town. In an April 24, 1986, memorandum, the Area Tribal Operations Officer discussed this problem and noted that there was no current membership roll. He stated: "[I]t is of the utmost importance for Alabama-Quassarte tribal officials to develop a current membership roll. If there are presently tribal officials holding office who do not meet the requirements as set forth in the Constitution, we are unable to make this determination without a current membership roll." Apr. 24, 1986, Memorandum at 2.

On September 12, 1996, Appellant was appointed Chief by the Governing Committee, presumably pursuant to Article VII of the Constitution. See Sept. 23, 1996, letter from the Town's Solicitor to the Superintendent, Okmulgee Agency, BIA. In May 1997, Appellant was elected to the position of Chief in a Town election. See Tribal Administrator's June 13, 1997, Letter to the Area Director.

On February 9, 1998, the Governing Committee enacted Resolution 98-AQTT-6, appointing Alison Alexander as Floor Speaker. On February 12, 1998, the Governing Committee enacted four additional resolutions relating to the Town's government, including Resolution 98-AQTT-13, in which the Governing Committee stated that it was accepting the resignation of Appellant as Chief. 2/

On February 16, 1998, Big Cloud Lewis, Chairman of the Enrollment Committee, and Alexander wrote to the Superintendent, asking for technical assistance "in confirming that enrollees meet the 1890 Census Card and 1895 Payroll enrollment criteria." 3/

On February 18, 1998, members of the Enrollment Committee delivered 422 enrollment files to the Area Office. In a February 23, 1998, memorandum to the Area Director, the Area Tribal Operations Officer reported:

2/ Appellant denies that she resigned.

3/ Alexander signed the letter as a member of the Enrollment Committee, not as Floor Speaker.

This office and staff from the Okmulgee Agency reviewed each individual membership file to verify eligibility. Based on the enrollment criteria set forth in the Constitution and the documentation contained in the files, this office has developed and attached a list of those individuals who meet the criteria and a second list of those individuals who do not.

The first list was titled "Eligible Alabama-Quassarte Tribal Town Members" and contained 145 names. The second list was titled "Not Alabama-Quassarte Members" and contained 277 names. The lists were evidently released to some Town members, presumably the Enrollment Committee members who had requested BIA assistance.

On February 26, 1998, a number of events occurred. Appellant, together with the Chairman of the Governing Committee (Zerndorff Billy) and the Town Secretary (Jeanetta Sumka) wrote a letter to the Superintendent, transmitting a list of individuals who, they stated, constituted "the official 1997-2001 list for Alabama/Quassarte Tribal Town Governing Committee Members and Elected Officials." The list showed Appellant as Chief and Lois Smith (rather than Alexander) as Floor Speaker. ^{4/} In addition to listing tribal officials, the letter stated: "We are officially requesting technical assistance to correct our membership roll and we are also requesting technical assistance to ratify our Constitution." ^{5/}

Also on February 26, 1998, the Area Director signed a statement reading:

To whom it may concern:

This office will continue to interact, on a government-to-government basis, with the Alabama-Quassarte Tribal Town Officials elected at the 1997 election or their successors until such time as they have officially resigned or have been removed pursuant to the Constitution and Bylaws of the Alabama-Quassarte Tribal Town.

On the same day, a membership meeting was held. The minutes of this meeting show that Appellant opened the meeting and called for "questions, answers, and discussion." Minutes of Feb. 26, 1998, Membership Meeting at 1. However, the minutes next state: "After discussion, Floor Speaker Alison Alexander made a roll call of membership using the 'Eligible

^{4/} The two individuals who signed this letter as Chairman and Secretary are the same two who, on Feb. 9, 1998, signed Resolution 98-AQTT-6, appointing Alexander as Floor Speaker.

^{5/} This latter request is puzzling. The 1939 Constitution was ratified long ago. It is possible that a revised Constitution has been proposed. However, there is no reference to such a document in the record.

Alabama Quassarte Tribal Town Members' list as verified by the Bureau of Indian Affairs dated February 23, 1998. Twenty five (25) eligible * * * [6/] members answered roll call." Id. Only those 25 individuals were permitted to vote during further proceedings.

During the further proceedings, Appellant was removed from office as Chief on the following grounds: "[S]he is a non-member, her name is not on the list of eligible town members; she is a mixed-blood and has not been confirmed by the membership that she is dependable and has special qualifications; and for misconduct in office: conduct unbecoming of a Chief representing the Alabama Quassarte." Id. at 2.

The Chairman, Secretary, and six members of the Governing Committee were also removed from office, either because they were "Mixed Blood not confirmed by the Membership that [they are] dependable and [have] special qualifications," id., or because they were "[i]neligible for Membership based on the Constitution." Id.

Replacements were elected for most of the positions.

On March 5, 1998, the Governing Committee, as constituted following the February 26, 1998, meeting, enacted Resolution 9803, adopting the February 23, 1998, BIA-prepared membership list titled "Eligible Alabama-Quassarte Tribal Town Members" as the Town's membership list. The Governing Committee also called a special membership meeting for March 8, 1998, at which the list was evidently ratified.

On March 18, 1998, Alexander asked the Area Director to certify the results of BIA's review of tribal membership. He declined to do so, stating that "certification of tribal membership is solely within the jurisdiction of the [Town]." Area Director's Mar. 19, 1998, Letter to Alexander.

Despite the actions taken at the February 26, 1998, membership meeting, Appellant's Governing Committee (presumably consisting of the individuals removed from office at that meeting) continued to meet. On March 26, 1998, it enacted Resolutions 06 AQTT-98 and 07 AQTT-98. The first of these granted all persons recognized as Town members prior to February 1, 1998, a one-year period in which to "enter and begin the grievance process with all rights, privileges, entitlements, and provisions intact until such grievance process is completed or an immediate adoption can be granted with the consent of the Assistant Secretary [- Indian

6/ The typewritten word "voting" is crossed out. A handwritten phrase has been substituted but is illegible.

Affairs].” Res. 06 AQTT-98 at 1-2. The second resolution requested the Assistant Secretary to consent to adoption “for members who have met all requirements for adoption into the [Town].” Res. 07 AQTT-98 at 1.

It appears that, during February 1998, each of the rival groups met with BIA officials to request assistance. On March 4, 1998, the Area Director wrote to Appellant and Alexander, asking them to submit briefing papers discussing the membership and leadership issues which they believed BIA should address. Both did so.

Because the Superintendent had asked to be recused, the Area Director appointed a Field Representative to review the briefing papers and issue a decision in the Superintendent’s stead. The Field Representative issued a decision on July 27, 1998, stating in part:

[R]emoval of [Appellant], the Governing Committee Chairman, the Governing Committee members and the Tribal Secretary was not valid because the February 26 meeting and removal actions did not provide due process. Due process was not afforded the affected Town leaders and other individuals regarding their membership status. While the Town has inherent authority to rescind membership status it has no written procedure in place to ensure due process rights to affected individuals. The Town has authority to remove elected officials but should follow its Federal Charter and Constitution and By-laws when removing officials. The following are my reasons for this decision.

If the February 26, 1998 “membership meeting” removed [Appellant] only and did not involve the issue of removal of membership from [Appellant] and from a majority of the Town’s members, we might determine that [Appellant] had been removed in a manner consistent with the removal of other Chiefs. The Town has apparently interpreted its Constitution to provide that a chief or other political figure may be removed upon a majority vote of members who are in attendance at any one meeting. The Town’s Constitution may however be to the contrary and appears to require a majority vote of the members of the Town. Under the terms of the Constitution then, there may have been insufficient votes to remove the Chief. However, the Tribe has removed previous Chiefs with a vote apparently insufficient under the Constitution, and those Chiefs did not appear to have protested the removal. This practice may constitute the Town’s interpretation of its Constitution.

However, the February 26, 1998 “membership meeting” goes beyond removing [Appellant] and some Governing Committee members. The meeting

effectively disenrolled 277 of 422 members. In other words, this meeting eliminated 66% of the Town's membership. The 277 individuals were not given notice regarding the Town's determination that their membership documentation did not support their previously granted membership status or allowed any hearing or opportunity to challenge the Town's findings. As of February 26 the BIA list was merely technical assistance to the Town. It did not constitute some sort of federal determination of tribal membership eligibility. Indeed, the Town only voted to accept the list of membership on March 5, 1998, two weeks after excluding 277 from membership and removing some of those individuals from office.

Field Representative's Decision at 6.

Alexander appealed this decision to the Area Director. On October 26, 1998, the Area Director vacated the Field Representative's decision. Citing, *inter alia*, Wadena v. Acting Minneapolis Area Director, 30 IBIA 130 (1996), he held that the dispute should be resolved in a tribal forum. He explained:

We believe the Alabama-Quassarte Tribal Town has a process within their own Constitution and Bylaws to resolve the dispute. Article V of the Constitution * * * provides in case of a dispute between the Governing Committee and the Chief, the matter shall be settled by the Town's Solicitor. Therefore, this matter should be resolved in the first instance by the Town's Solicitor.

If there is some internal procedural reason why the Solicitor cannot in this case resolve the dispute, the BIA can provide technical assistance to the Town in establishing a tribal forum to resolve the dispute. For example, the Town "might wish to consider, for the purpose of resolving this dispute, either vesting jurisdiction over this dispute in the CFR court or acquiring the temporary services of a tribal judge, perhaps an experienced judge from another tribe." See Brady v. Acting Phoenix Area Director, 30 IBIA 294[, 301] (1997).

Area Director's Decision at 2.

The Area Director also rescinded his February 26, 1998, statement that BIA would continue to recognize Appellant's government. He declined to recognize either group on an interim basis but left open the possibility that he would do so if the need arose prior to completion of the tribal process.

Appellant appealed the Area Director's decision to the Board. Appellant and Alexander filed briefs. 7/

Discussion and Conclusions

Appellant seeks reinstatement of the Field Representative's July 27, 1998, decision. She contends that the Area Director misunderstood the situation within the Town. Further she contends:

There is no tribal forum to resolve this dispute. There is no Tribal Court or CFR Court with jurisdiction. There is no Tribal Town "Solicitor" to refer to as such position has long been vacant and, anyway, this type of dispute is not within that Office's jurisdiction, the membership cannot decide the question because [BIA] meddling in internal tribal affairs in February, 1998 threw into question who the members of the Tribe are, and this is the root of the dispute herein. So now there is now [sic, probably should be "no"] clearly recognized Tribal membership until the Bureau takes affirmative action to re-recognize the membership that they have for so long previously recognized.

Notice of Appeal at 5.

Both Appellant and Alexander state that they agreed to submit the tribal government dispute to BIA for resolution. See Appellant's Opening Brief at 5 ("All factions of the [Town] submitted this dispute of recognition of tribal officials to [BIA] as the agreed upon forum for dispute resolution. No other forum could be, or is now, agreed upon"); Alexander's Answer Brief at 10 ("In the present matter, because of the nature of the dispute, both the Town [Governing Committee] and [Appellant] have agreed to allow the BIA to consider the question of which persons constitute the legitimate Town officers and [Governing Committee]").

These statements show that both Appellant and Alexander misunderstand the role of BIA in this matter. In order to carry out the government-to-government relationship with a tribe, BIA must sometimes make a determination as to which of two competing tribal governments it will recognize pending resolution of the dispute in a tribal forum. However, BIA's determination in such a case is only an interim one and must give way as soon as the dispute is resolved in the tribal forum. E.g., LaRocque v. Aberdeen Area Director, 29 IBIA 201 (1996);

7/ Alexander's brief is purportedly filed on behalf of the Governing Committee as well as Alexander. For the same reason the Board does not consider the Governing Committee to be an appellant in this matter, see n.1, supra, it does not consider it to be an interested party.

Bucktooth v. Acting Eastern Area Director, 29 IBIA 144 (1996). It is clear from these cases that, in making recognition determinations in its government-to-government role, BIA does not purport to resolve a tribe's internal disputes or to serve as a tribal forum. The fact that the parties to this appeal want BIA to serve as a tribal forum does not and cannot change that fact.

The just-discussed statements of the parties suggest that both Appellant and Alexander see this dispute as one concerning only tribal leadership. Yet both Appellant and Alexander otherwise seem to understand that there is an underlying, and much more serious, dispute here concerning tribal membership. Further, despite some statements to the contrary, both seem to understand that membership issues must be resolved by the Town, not by BIA. However, neither seems to grasp the obvious point that the leadership issue cannot truly be resolved until the Town has first resolved its membership problem.

Although neither of these problems can be resolved in this appeal, there is one conspicuous issue which must be addressed. That issue concerns the actions taken at the February 26, 1998, meeting.

[1] The Board has held that, in discharging its duties under the government-to-government relationship, BIA has the authority and the responsibility to decline to recognize the results of a tribal action when it finds that a violation of the Indian Civil Rights Act (ICRA), 25 U.S.C. § 1302, has occurred. *E.g.*, Naylor v. Sacramento Area Director, 23 IBIA 76 (1992) (tribal election); Greendeer v. Minneapolis Area Director, 22 IBIA 91 (1992) (removal of tribal officials). See also Alan-Wilson v. Sacramento Area Director, 30 IBIA 241, 260 (1997), and cases cited therein. Among other things, the ICRA requires that an Indian tribe afford due process to all persons within its jurisdiction. 25 U.S.C. § 1302(8).

The Field Representative found that the removal actions taken at the February 26, 1998, meeting were not valid because the due process rights of the removed officials and many Town members (those whose membership had been questioned) were violated. There seems little doubt that serious due process violations occurred at the February 26, 1998, meeting. For example, although many Town members were deprived of the right to vote at the meeting, there is no evidence that any of them were given notice that they would not be permitted to vote. ^{8/}

^{8/} The Field Representative stated that the Feb. 26, 1998, meeting “effectively disenrolled” 277 Town members. The minutes of the meeting support that statement in that they indicate that the 277 were not deemed to be members. Arguably, however, no “disenrollment” action was taken until Mar. 5, 1998, when the new Governing Committee purported to adopt a membership list which excluded the 277. Whether or not the 277 were disenrolled at the Feb. 26, 1998, meeting, they were clearly disenfranchised.

Nor is there any evidence that they were given any right to a hearing on the matter. Similarly, as far as the record shows, the removed officials were not given notice of their proposed removal or of the circumstances under which their removal would be voted upon.

The Board finds that, under Naylor and Greendeer, the due process violations that occurred at the February 26, 1998, meeting preclude BIA from recognizing the results of that meeting. The Field Representative reached a similar conclusion in his July 27, 1998, decision. The Area Director vacated the Field Representative's decision in toto. Although the Area Director did not recognize the results of the February 26, 1998, meeting, his decision left open the possibility that such recognition could occur in the future. The Board finds that, to the extent the Area Director left that possibility open, he was in error.

As noted above, in addition to vacating the Field Representative's decision, the Area Director also vacated his own February 26, 1998, statement that BIA would continue to recognize Appellant's government. Given the serious membership problems within the Town, there may be valid reasons for BIA to refrain from recognizing Appellant's government. ^{9/} Therefore, the Board will not require that BIA re-recognize Appellant's government but will remand this matter so that the Area Director may determine whether, in light of the Board's conclusion concerning the February 26, 1998, meeting, BIA should re-recognize Appellant's government at this time.

The parties agree that the Town has departed from the membership criteria established in its Constitution, resulting in a situation where many individuals who do not qualify under those criteria have been recognized as members. As far as can be determined by the filings in this appeal, neither side has shown any inclination to attempt a resolution of the membership problem. However, there is little likelihood that the problem can be resolved unless the two sides are willing to talk seriously about it. The problem has evidently developed over a long period of time. Assuming the Field Representative's figures are correct, and thus two-thirds of the Town's present members are ineligible for membership under the Constitutional criteria, the problem has now reached massive proportions. Thus, an overnight solution is unlikely to present itself.

BIA cannot resolve the Town's membership problem. It is possible, however, that BIA can offer guidance to the Town or assist the Town in locating a mediator experienced in tribal government problems. See Burris v. Sacramento Area Director, 33 IBIA 66 (1998), for an example of BIA's assistance to a tribe which had membership and organizational problems.

^{9/} There is also an as-yet unaddressed issue concerning Appellant's purported resignation from office prior to the Feb. 26, 1998, meeting.

As will be evident from a reading of Burris, the process there was a long and exacting one and, even with substantial BIA assistance, depended ultimately upon the efforts of several dedicated tribal members.

Pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Area Director's October 26, 1998, decision is vacated, and this matter is remanded to him for a new determination as to whether Appellant's government should be re-recognized in light of the conclusion discussed above concerning the February 26, 1998, meeting. Upon request of the parties to this appeal, the Area Director shall offer whatever assistance he can to help the Town address its membership problem. 10/

//original signed

Anita Vogt
Administrative Judge

I concur:

//original signed

Kathryn A. Lynn
Chief Administrative Judge

10/ Expedited consideration is granted. All other pending motions are denied.